No. 6588.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Gilbert S. Johnson,
Appellant,
vs.
United States of America,
Appellee.

PETITION FOR REHEARING.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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TABLE OF CASES AND AUTHORITIES CITED.

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PETITION FOR REHEARING.

Appellant, Gilbert S. Johnson, respectfully petitions the above-entitled Honorable Court to grant appellant a rehearing in the above-entitled cause, and bases his application for a rehearing upon the following grounds, to-wit:

I.

The court erred in refusing to sustain the motion to quash the indictment filed in this case concerning which the court uses the following language in its opinion: "We cannot consider the motion to quash as the equivalent of a demurrer." (Page 2.)

In that connection we desire most respectfully to call the court's attention to the following authorities:

The case of *U. S. v. Oppenheimer,* 242 U. S. 85, 61 L. Ed. 161, holds that the designation given to a pleading by a defendant or by the court below cannot change its essential nature, and will disregard the misnomer and act upon the fact. The court saying:

> "The government brings this writ of error, treating the so-called motion to quash as a plea in bar, which in substance it was. (U. S. v. Barber, 219 U. S. 72.)"

In *U. S. v. Barber, supra,* the court says:

> "The claim that the pleas were not in bar, but merely in abatement, is, we think, equally untenable. The designation of the respective pleas as a plea in abatement did not change their essential nature."

Also the case of *U. S. v. Thompson,* 251 U. S. 407, 64 L. Ed. 341, the court says:

> "As it is settled that this question is to be determined, not by form, but by substance," (Citing U. S. v. Barber, *supra.*)

We believe that from the foregoing authorities this court should have treated the so-called motion to quash as the equivalent of a demurrer and, after so doing, to have then reversed the District Court for its failure to sustain said motion or demurrer for the reason stated therein.

II.

The court erred in refusing to consider the appellant's exceptions to the charge as given by the trial court because none of the evidence was set forth in the bill of exceptions (pages 4 and 5), for the following reasons:

(a) That said instructions are fully set forth in the bill of exceptions, together with all exceptions thereto.

(b) That said instructions are partisan, one-sided, and favored the government throughout.

(c) That said instructions invaded the province of the jury on questions of fact and, in effect, directed the jury to find the defendant guilty.

(d) That prejudicial illustrations were given to the jury by the trial judge in its instructions.

(e) That said instructions as given were clearly argumentative.

(f) That said instructions excepted to were erroneous under every conceivable state of facts.

Argument and Authorities.

We recognize that "the settled rule is that where the record contains no part of the evidence that the judgment will not be disturbed on account of instructions alleged to be erroneous, *unless it appears that such instructions would have been erroneous under every conceivable state of facts.*"

> *Carpenter v. Ewing,* 76 Cal. 488, 18 Pac. 432;
> *Richmond Coal Company v. Commercial Assurance Company,* 169 Fed. 753 (C. C. A. 9).

Taking the above rule, can it not be said that the instructions complained of herein are "erroneous under every conceivable state of facts"? Particularly the following portions:

> "You do not have to believe that if I am caught in the act of setting fire to a house and I say to the

officer, 'Well, I did not intend to burn that house,' he does not have to believe that, and probably would not." [Tr. pp. 211 and 212.]

No good faith is involved in the illustration given, whereas the question of good faith and honest belief is involved in any condition or state of facts in a mail fraud case.

Sunderland v. U. S., 19 F. (2d) 202-214 (C. C. A. 8).

Again at pages 212 and 213 of the transcript we find this language:

"'They say that 'straws tell which way the wind blows'. Now, it might be that the defendant did not consider that extremely important, but he was used to making reckless statements. That is an element that you may consider properly in this case, that there were extravagant statements made; of course, there is no denying that. For instance, I think it was yesterday afternoon, something was shown here where it was said that a big gusher was absolutely assured, a big gusher absolutely assured. Now, it is difficult, gentlemen of the jury, to reconcile that with honest belief in anybody. 'Assured' means, as we all know, 'sure,' 'that it was sure'; and it is significant, gentlemen, that every single one of these statements contains an invitation to buy stock; every single one without exception, so far as I remember, is an invitation to buy stock—not only an invitation, but an urgent invitation. Well, now the defendant might have been entirely innocent; he might have honestly believed that, but his honest belief is not sufficient unless the facts warranted him in expressing such belief, unless his information and facts warranted him." "The evidence in this case shows that from the very beginning this defendant pursued

> a consistent line of advertising, and I will not, I think, go too strong in calling it extravagant advertising. It is a little singular, gentlemen, that if he was honest in his belief that that continued."

Under every conceivable state of facts that charge is erroneous, in our opinion. In speaking of extravagant statements, the court says: "Of course, there is no denying that," also when he says: "Now, it is difficult, gentlemen of the jury, to reconcile that with honest belief in anybody."

The above quote matter, coming from the trial judge in his charge to the jury, sets at naught defendant's plea of not guilty and the question of his good faith and honest belief.

Again the trial judge says: "Well, now, the defendant *might* have been entirely innocent; he *might* have honestly believed that, *but his honest belief is not sufficient unless the facts warranted him in expressing such belief. Unless his information and facts warranted him.*"

The trial court again ignores the fundamental principle in all cases of this kind and character on the question of the good faith and/or honest belief of the defendant. That charge is erroneous under every conceivable state of facts in a case of this kind. See *Sandals v. U. S.*, 213 Fed. 569-575 (C. C. A. 6), wherein that court says:

> "A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure be incapable of committing a conscious fraud. Human credulity may include among its victims even the supposed imposter. If the men accused in the instant case really entertained the con-

> viction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged."

As was said by Chief Justice Fuller in *Starr v. U. S.,* 153 U. S. 614-626, 38 L. Ed. 841:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may be controlling."

In the case of *Dolan v. U. S.,* 123 Fed. 54 (C. C. A. 9), the court says:

> "An instruction that assumes the existence of a fact which should be left to the jury for ascertainment is erroneous."

In *Sunderland v. U. S.,* 19 F. (2d) 202-216 (C. C. A. 8), the court, in discussing how far judges may go in giving instructions to the jury, had this to say:

> "It should not be permitted to do indirectly what it cannot do directly and by its instructions to in effect argue the jury into a verdict of guilty. * * * he may not extend his activities so far as to become in effect either an assistant prosecutor or a thirteenth juror."

In our opinion the court erred in invoking the provisions of section 269 of the Judicial Code, as amended, and quoting from the case of *Haywood v. U. S.,* 268 Fed. 795-798 (C. C. A. 7), which we believe to be contrary to the ruling of this Circuit in the case of *St. Clair v. U. S.,* 23 F. (2d) 76-80, and also, in our opinion, is contrary to the doctrine laid down by the Supreme Court in

the case of *U. S. v. River Rouge Company,* 269 U. S. 411-421, 70 L. Ed. 339, in which this language was used:

> "The present case is not controlled by the provision of section 269 of the Judicial Code, as amended by the Act of February 26, 1919 (28 U. S. C. A. 391; Comp. St. 1246), that in an appellate proceeding judgment shall be given after an examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' We need not enter upon a discussion of the divergent views which have been expressed in various Circuit Courts of Appeals as to the effect of the Act of 1919. It suffices to say that since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—*especially when embodied in the charge to a jury—is to be held a ground for reversal,* unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party."

For the reasons hereinabove set forth we respectfully ask this court to grant the petition of the appellant for a rehearing in this case.

Respectfully submitted,

H. L. Arterberry,
Attorney for Appellant.

I, H. L. Arterberry, one of the attorneys for appellant, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded and that the same is not interposed for delay.

H. L. Arterberry.